PEMUNYA KAPAL DAN ORANG-ORANG LAIN YANG MEMPUNYAI KEPENTINGAN DALAM KAPAL M.V. "BRIHOPE"

v.

EMANUEL E. OKWUOSA & ORS. (NO. 2)

COURT OF APPEAL, KUALA LUMPUR
DATO' DR. ZAKARIA MOHD. YATIM JCA
DATO' SHAIK DAUD MOHD. ISMAIL JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL MRRS. NO: P-02-69-94]
20 APRIL 1995

SHIPPING: *Admiralty action in rem - Claim by Crew for unpaid wages - Whether having any maritime lien - Order for appraisement and sale of ship - Whether proper.*

CIVIL PROCEDURE: *Admiralty action in rem - Intervention - Principles - Whether a matter of right - Whether needed leave of Court - Object of permitting intervention - Order 70 r. 16 Rules of the High Court 1980 .*

CIVIL PROCEDURE: *Admiralty action in rem - Intervention - Application by mortgagee to intervene after final judgment delivered against shipowner - Whether allowable - Whether could amount to res judicata - Whether could be estopped by conduct - Effect of intervention on liability of shipowner - Whether shipowner's liability to remain as liability in personam - Consideration of* ***the Soeraya Emas****.*

CIVIL PROCEDURE: *Admiralty action - Final judgment in rem - Setting aside - Principles - Order 70 r. 16 Rules of the High Court 1980.*

This appeal, the second involving the ship M.V. BRIHOPE (the ship), was at the instance of Hong Leong Leasing Sdn. Bhd. (Hong Leong), the mortgagee of the ship. The facts were that, on 7 June 1994, following an *in rem* action by the Crew (the plaintiffs) for unpaid wages (the second action), Azmel J. entered summary judgement for the Crew for RM468,300 and ordered that the ship be sold off to settle the claim. In consequence, the ship was sold for RM1.44 million after due appraisement made by the Sheriff.

It was not in dispute that when the second action was initiated in April 1994, only the shipowners (Finego) responded and proceeded to file appearance. Hong Leong, despite having notice of the action, and of the subsequent application for summary judgment, had done nothing to intervene, or to litigate the action. Hong Leong however decided to intervene when judgment was entered against Finego on 7 June 1994, whereupon it applied to set aside the judgment. As it was, the application was dismissed by Azmel J on the grounds firstly, that Hong Leong had not produced any new material for consideration of the Court,

secondly that the plaintiffs had a maritime lien over the ship thereby justifying the order for appraisement and for the sale of the ship, and thirdly that the Court, having already made a final order, was *functus officio*. Hence, the appeal herein by Hong Leong.

Before the Court of Appeal, Hong Leong admitted that the judgment of 7 June 1994 was a valid judgment. It submitted, nonetheless, that the judgment, being a judgment *in rem*, could be set aside on account of the interest that it had in the ship. Citing the case of *Soeraya Emas*, Hong Leong contended that its attack (on the judgment) could have no effect on the personal liability of Finego to satisfy the judgment, as that liability would continue to operate against Finego alone as a judgment *in personam.* These apart, it was argued that Azmil J's judgment ought to be set aside as (i) the Statement of Claim did not contain any prayer for appraisement and sale of the vessel (ii) the O. 14 application, being an application in chambers, was not a proper vehicle for an application for appraisement and sale (iii) the ship was arrested pursuant to the action of the cargo owners and not by virtue of the action taken by the plaintiffs (iv) some of the particulars in the Statement of Claim did not amount to "wages" in law.

Inter alia the issues that arose were:

(i) whether Hong Leong could properly interfere with the plaintiffs' right to obtain execution by appraisement and sale.

(ii) whether Hong Leong ought to be allowed to come in and intervene after the shipowner's liability had been pronounced.

(iii) whether it was open for Hong Leong to rely on *Soeraya Emas* and question the judgment *in rem* in question.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The object of permitting intervention is "to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action and to prevent the same or substantially the same questions or issues being tried twice with possibly different results". As a rule, the would be intervener should have some interest which is directly related or connected with the subject matter of the action.

[2] Intervention in Admiralty proceedings *in rem* is covered by O. 70 r. 16 Rules of the High Court 1980. The rules do not state the point of time at which intervention should take place, but what should be noted is that intervention is not a matter of right but may be had only with the leave of the Court. Judicial discretion is thus involved

[3] The general rule of law is that no person is to be adversely affected by a judgment in an action to which he was not a party. But this general rule admits of two exceptions. One is that a person who is in privity with parties is bound equally with the parties, in which case he is estopped by *res judicata.* The other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

[4] In the present case, Hong Leong were as good as privys because under the default clause in the mortgages their equity had crystallised, and Finego were owners in name only as soon as the ship was arrested. They could have intervened before 7 June 1994 but elected not to do so. Therefore they were estopped from applying to set the judgment aside after it was passed.

[5] However, even if Hong Leong had intervened in time, they could not have raised the issues which they raised about the wages and disbursements of the Master and Crew. Hong Leong could not have *locus standi* to do so as the question raised pertained to a contractual issue between Finego and the plaintiffs which was of no direct concern to Hong Leong.

[6] A final judgment cannot be varied or set aside by the Court which made it unless it is a judgment by default or made in the absence of a party at the trial or hearing. In the instant case, the judgment obtained by the plaintiffs Master and Crew was in no sense an interlocutory judgment, and nor was it a default judgment. It was a final judgment. The judgment cannot therefore be set aside as the trial Judge was already *functus officio*.

[7] The procedure for obtaining default judgment in actions *in rem* is specifically provided for by O. 70 r. 20 RHC 1980. Where an appearance has been entered by the defendant (as was done here by Finego), an application for a judgment in default of defence can be made **after** the time for filing the defence has expired. The Court has the power to set aside or vary such judgments by default by O. 70 r. 20(9). In the present case, the plaintiffs moved for summary judgment under O. 14 shortly after appearance was entered. They were quite entitled to do so.

[8] The facts showed that the defences taken by Hong Leong were the same defences as advanced by Counsel for the BRIHOPE. It was also evident that the plaintiffs had fully complied with O. 14 r. 2 Rules of the High Court 1980. And as far as natural justice is concerned, Hong Leong was afforded a fair opportunity of being heard but deliberately chose not to avail themselves of it when they appeared before the Judge on 7 June 1994. These being the circumstances, to allow Hong Leong

to reopen the same issues would have rejudiced the plaintiffs, not least because of the tremendous delay it would have caused.

[9] Hong Leong's reliance on *Soeraya Emas* is without merit. *Soeraya Emas* is not good authority for the proposition that interveners in an Admiralty *in rem* action can come at any time after a final judgment has been pronounced and have the whole matter reopened to take the defences the shipowner ought to have taken. The rule is that an intervener cannot come in after the shipowner's liability had been pronounced. There is also no precedent that suggests that a final judgment *in rem* is a divisible commodity, so that, if it is set aside at the instance of an intervener it can still continue to have an independent existence against a shipowner.

[10] The fact that the statement of claim of the plaintiffs did not contain any prayer for appraisement and sale is not a material omission and is not fatal. So also the fact that the ship was under arrest in the first action by the cargo owners and not in the action by the plainitffs. Order 2 r. 1 of RHC 1980 requires the Court to treat every non-compliance as irreglarity which the Court can remedy as it think just. This is indeed what happened and it is not open to Hong Leong to contend that the order made on 7 June 1994 was a nullity.

[11] The Courts always have a liberal view of what constitutes "wages". If a seaman's contract includes emoluments by way of air passages on home leave for himself or his spouse it comes within the definition of "wages". Likewise, money for necessaries advanced on the credit of the ship could also give a paramount right of repayment enforceable *in rem* against the ship.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PERKAPALAN:** Tindakan Admiralti in rem - Tuntutan oleh krew untuk gaji yang belum dibayar - Samada mempunyai apa-apa lien maritim - Perintah untuk pentaksiran dan penjualan kapal - Samada wajar.*

***PROSEDUR SIVIL:** Tindakan Admiralti in rem - Pencelahan - Prinsip-prinsip - Samada merupakan hak - Samada memerlukan kebenaran Mahkamah - Tujuan membenarkan pencelahan - Aturan 70 k. 16 Kaedah-kaedah Mahkamah Tinggi 1980.*

***PROSEDUR SIVIL:** Tindakan Admiralti in rem - Pencelahan - Permohonan pemegang gadai-janji untuk mencelah selepas penghakiman muktamad diberikan terhadap pemilik kapal - Samada boleh dibenarkan - Samada boleh membawa kepada res judicata - Samada boleh diestop oleh perbuatan - Kesan pencelahan ke atas tanggungan tuanpunya kapal*

- Samada tanggungan tuanpunya kapal handaklah kekal sebagai tanggungan in personam - Pertimbangan ***The Soeraya Emas.***

PROSEDUR SIVIL: *Tindakan admiralti - Penghakiman muktamad in rem - Pengenepian - Aturan 70 k. 16 Kaedah-kaedah Mahkamah Tinggi 1980.*

Rayuan ini, yang kedua melibatkan kapal M.V. BRIHOPE (kapal tersebut) pada adalah oleh Hong Leong Leasing Sdn. Bhd. (Hong Leong) yang merupakan pemegang gadai-janji kapal tersebut. Fakta-faktanya adalah bahawa, pada 7 Jun 1994, berikutan dengan satu tindakan *in rem* oleh krew (plaintif) bagi gaji yang tidak dibayar (tindakan kedua), Azmel H telah memasukkan penghakiman terus untuk krew tersebut bagi RM468,300 dan memerintahkan supaya kapal itu dijual untuk menjelaskan tuntutan mereka. Akibatnya, kapal itu telah dijual dengan harga RM1.44 juta selepas penaksiran dibuat oleh Sheriff.

Tidak dipertikaikan bahawa ketika tindakan yang kedua dimulakan dalam bulan April 1994, hanya tuan-tuan punya kapal (Finego) sahaja memberikan jawapan dan memfailkan kehadiran. Hong Leong, walaupun mempunyai notis mengenai tindakan itu, dan mengenai permohonan berikutannya untuk penghakiman terus, telah tidak melakukan apa-apa untuk mencelah, atau untuk melitigasikan tindakan tersebut. Hong Leong namun begitu bertindak untuk mencelah ketika penghakiman dimasukkan terhadap Finego pada 7 Jun 1994, di mana ianya telah memohon untuk mengenepikan penghakiman tersebut. Permohonan tersebut telah ditolak oleh Azmel H atas alasan bahawa pertamanya, Hong Leong telah tidak mengemukakan apa-apa bahan baru untuk pertimbangan Mahkamah, keduanya, bahawa plaintif mempunyai lien maritim ke atas kapal tersebut yang mewajarkan perintah untuk pentaksiran dan untuk penjualan kapal tersebut, dan ketiganya, bahawa Mahkamah, setelah membuat perintah muktamad, sudah *functus officio.* Hong Leong, dengan yang demikian, telah merayu.

Di hadapan Mahkamah Rayuan, Hong Leong mengakui bahawa penghakiman bertarikh 7 Jun 1994 itu adalah penghakiman yang sah. Ia bagaimanapun berhujah bahawa penghakiman itu, yang merupakan satu penghakiman *in rem*, boleh diketepikan ekoran kepentingan yang dimilikinya dalam kapal tersebut. Menyebut kes *Soeraya Emas*, Hong Leong menegaskan bahawa cabarannya (ke atas penghakiman itu) tidak akan memberi apa-apa kesan ke atas tanggungan persendirian Finego untuk memenuhi penghakiman tersebut, kerana tanggungan itu akan terus beroperasi terhadap Finego sahaja sebagai satu penghakiman *in personam.* Selain itu dihujahkan juga bahawa penghakiman Azmil H harus diketepikan kerana (i) Pernyataan Tuntutan tidak mengandungi apa-apa pohonan untuk pentaksiran dan penjualan kapal (ii) permohonan A. 14, yang merupakan satu permohonan dalam kamar, tidak merupakan alat yang wajar untuk permohonan bagi pentaksiran dan penjualan (iii) kapal tersebut telah ditahan akibat tindakan tuan-tuanpunya kargo dan bukannya menurut tindakan yang diambil oleh plaintif (iv) sebahagian dari butir-butir dalam tuntutan tidak merupakan “gaji” atau “wages” disisi undang-undang.

Antara lain isu-isu yang berbangkit adalah: *a*

(i) samada Hong Leong boleh sewajarnya mengganggui hak plaintif untuk mendapatkan perlaksanaan melalui pentaksiran dan penjualan.

(ii) samada Hong Leong seharusnya dibenarkan untuk turut serta dan mencelah setelah tanggungan tuanpunya kapal disebut. *b*

(iii) samada ianya terbuka bagi Hong Leong untuk bergantung pada *Soeraya Emas* dan menyoal penghakiman *in rem* berkenaan.

Diputuskan: *c*

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Tujuan membenarkan pencelahan adalah "to prevent multiplicity of actions and to enable the Court to determine dispute between all parties to them in one action and to prevent the same or substantially the same questions or issues being tried twice with possibly different results". Sebagai aturannya, bakal pencelah haruslah mempunyai kepentingan yang berkaitan secara terus atau berhubungan dengan halperkara tindakan itu. *d*

[2] Pencelahan dalam prosiding Admiralti *in rem* adalah dirangkumi oleh A. 70 k. 16 Kaedah-kaedah Mahkamah Tinggi 1980. Kaedah-kaedah tersebut tidak menyatakan waktu di mana pencelahan harus dilakukan, tetapi apa yang harus diambil perhatian adalah bahawa pencelahan bukannya merupakan satu hak tetapi akan hanya diperolehi dengan kebenaran Mahkamah. Budibicara kehakiman dengan itu terlibat dalam perkara ini. *e* *f*

[3] Kaedah am undang-undang adalah bahawa, tidak seorang pun boleh terjejas dengan cara yang memudaratkan oleh sesuatu penghakiman dalam sesuatu tindakan yang mana dia bukannya satu pihak. Tetapi kaedah am ini membenarkan dua pengecualian. Satu daripadanya adalah bahawa seseorang yang dalam priviti dengan pihak-pihak tersebut adalah terikat secara sama dengan pihak-pihak itu, dalam keadaan yang mana beliau adalah diestop oleh *res judicata*. Yang satu lagi adalah bahawa seseorang mungkin telah bertindak sedemikian bagi menghalang dirinya daripada mencabar penghakiman tersebut, dalam keadaan yang mana beliau adalah diestop oleh perbuatannya sendiri. *g* *h*

[4] Dalam kes semasa ini, Hong Leong adalah seumpama privi-privi kerana di bawah fasal kemungkiran dalam gadai-janji, ekuiti mereka telah menjadi kenyataan, dan Finego adalah tuanpunya pada nama sahaja sebaik sahaja kapal itu ditahan. Mereka boleh mencelah sebelum 7 Jun 1994 tetapi telah memilih untuk tidak melakukan sedemikian. Dengan itu mereka adalah *i*

diestop daripada memohon untuk mengenepikan penghakiman selepas ianya diluluskan.

[5] Walaubagaimanapun, jikapun jika Hong Leong tidak lambat mencelah, mereka tidak boleh membangkitkan isu-isu yang telah mereka bangkitkan mengenai gaji dan pembayaran kepad Nakhoda dan krew. Hong Leong tidak mungkin mempunyai *locus standi* untuk melakukan sedemikian kerana persoalan yang berbangkit adalah berkaitan dengan isu kontraktual antara Finego dan plaintif-plaintif tersebut yang mana tidak mempunyai kaitan secara langsung dengan Hong Leong.

[6] Penghakiman muktamad tidak boleh diubah atau diketepikan oleh Mahkamah yang membuatnya kecuali ianya merupakan satu penghakiman melalui keingkaran atau dibuat dalam ketidakhadiran sesuatu pihak di perbicaraan. Dalam kes semasa ini, penghakiman yang diperolehi oleh plaintif-plaintif Nakhoda dan Krew adalah tanpa diragui lagi suatu penghakiman interlokutori, dan ianya bukan suatu penghakiman ingkar. lanya adalah penghakiman muktamad. Penghakiman tersebut dengan itu tidak boleh diketepikan kerana Hakim perbicaraan telah pun *functus officio*.

[7] Prosedur bagi mendapatkan penghakiman terus di dalam tindakan-tindakan *in rem* telah diperuntukkan secara khusus oleh O. 70 k. 20 KMT 1980. Di mana kehadiran telah dimasukkan oleh seseorang defendan (seperti yang dibuat oleh Finego di sini), suatu permohonan untuk penghakiman ingkar pembelaan bolehlah dibuat **selepas** masa untuk memfailkan pembelaan tamat. Mahkamah mempunyai kuasa untuk mengenepikan atau meminda penghakiman-penghakiman ingkar sedemikian di bawah A. 70 k. 20(9). Dalam kes semasa, plaintif telah memohon untuk mendapatkan penghakiman terus di bawah A. 14 sejurus selepas kehadiran di masukkan. Mereka agak berhak untuk berbuat demikian.

[8] Fakta-fakta menunjukkan bahawa pembelaan yang diambil oleh Hong Leong adalah pembelaan-pembelaan yang sama sepertimana yang dikemukakan oleh Peguam bagi pihak BRIHOPE. Ianya adalah juga jelas bahawa plaintif-plaintif telah mematuhi sepenuhnya A. 14 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980. Dan sejauhmana keadilan asasi adalah berkaitan, Hong Leong telah diberi peluang yang wajar untuk didengar tetapi telah dengan sengaja memilih untuk tidak didengar ketika mereka hadir di hadapan Hakim pada 7 Jun 1994. Dengan keadaan ini, membenarkan Hong Leong membuka semula isu-isu yang sama itu akan memudaratkan plaintif, kerana akan menyebabkan kelewatan yang keterlaluan.

[9] Penggantungan Hong Leong ke atas *Soeraya Emas* adalah tidak bermerit. *Soeraya Emas* bukannya merupakan autoriti yang baik untuk proposisi bahawa pencelah-pencelah dalam tindakan Admiraliti *in rem*

bolah muncul pada bila-bila masa selepas penghakiman muktamad telah diisytiharkan dan membuka semula perkara tersebut untuk mengambil pembelaan yang seharusnya telah diambil oleh tuanpunya kapal. Aturannya adalah bahawa pencelah tidak boleh dimasukkan selepas liabiliti tuanpunya kapal telah diputuskan. Tidak juga terdapat apa-apa otoriti yang menyarankan bahawa penghakiman muktamad *in rem* adalah suatu komoditi yang boleh dibahagi, supaya jika ianya diketepikan atas permohonan pencelah, ianya masih boleh terus beroperasi dengan bebas terhadap tuanpunya kapal.

[10] Fakta bahawa pernyataan tuntutan plaintif tidak mangandungi apa-apa pohonan untuk pentaksiran dan penjualan bukanlah satu peninggalan yang material dan ianya tidaklah memudaratkan. Begitu juga fakta bahawa kapal tersebut telah ditahan dalam tindakan oleh tuanpunya kargo dan bukannya dalam tindakan oleh plaintif. Aturan 2. k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 menghendaki Mahkamah untuk menganggap setiap ketidak patuhan sebagai perkara luar aturan yang mana Mahkamah boleh remedikan secara yang difikirkan sesuai. Inilah yang sesungguhnya telah berlaku dan ianya tidak terbuka kepada Hong Leong untuk menegaskan bahawa perintah yang dibuat pada 7 Jun 1994 adalah suatu pembatalan.

[11] Mahkamah sentiasa mempunyai pandangan yang liberal tentang apakah yang merupakan "wages" atau "gaji". Sekiranya kontrak seseorang pelaut atau kelasi itu merangkumi emolumen bagi menanggung perbelanjaan penerbangan bagi dirinya ataupun isterinya semasa percutian maka itu adalah termasuk dalam definasi "wages". Begitu juga, wang yang didahulukan bagi keperluan-keperluan kapal boleh memberikan satu hak yang kukuh untuk pembayaran balik yang mana boleh dilaksanakan secara *in rem* terhadap kapal.

[Rayuan ditolak]

Cases referred to:
Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming/Intervener) [1992] 2 MLJ 642 ***(foll)***
Tung Lieng (Penang) Trading v. Liew Cheong Thye [1986] 2 MLJ 197 ***(foll)***
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143 ***(foll)***
Nana Oforu Atta (etc) v. Nana Abu Bonsra (etc) [1958] AC 95 ***(foll)***
Foong Tai v. Buchheister [1908] AC 458 ***(refd)***
The Gemma [1899] P. 285 ***(dist)***
The August 8 [1983] 2 AC 450 ***(cit)***
The Dictator [1892] P. 304 ***(cit)***
The Byzantion [1922] 127 LT 756 ***(dist)***
The "Alletta" [1974] LL. LR ***(foll)***
The Westport [1965] 1 LL. LR 547 ***(dist)***
Arantzaze Mendi [1939] AC 256 ***(cit)***
The "Cap Bon" [1967] 1 LL LR 543 ***(dist)***

Legislation referred to:
Merchant Shipping Ordinance 1952, ss. 99, 119, 145
Rules of the High Court 1980, O. 2 r. 1, O. 14 r. 2, O. 15 r. 6, O. 29 r. 4, O. 70 r. 20(9), O. 75 r. 16

Other sources referred to:
Maritime Liens, D.R. Thomas, Vol. 14 British Shipping Laws, p. 184, para. 321
British Shipping Laws (1975), Vol. 1, *Admiralty Practice*, p. 167, para 382
Admiralty Jurisdiction and Practice (1993), Nigel Meeson, p. 144
Halsbury Laws of England, Vol. 1, 4th Edn., p. 233, para. 338, 454
Supreme Court Practice 1993, Vol. 1 para. 75/22/2

For the respondents - Bernard Kok; M/s. Ban Eng, Anual & Foong
For the appellants - Surinder Singh; M/s. Lee Hishamuddin

JUDGMENT

Mahadev Shankar JCA:

The background to this appeal is fully set out in the first judgment. The undue length of this judgment may perhaps be mitigated by the novelty of the issues raised.

Hong Leong obtained leave to intervene on an *ex parte* application. The order was made on 17 June 1994 followed by Hong Leong's appearance on 22 June 1994.

Hong Leong's Summons-in-Chambers to set aside filed on 7 July 1994 prayed for two orders:

(a) that the whole of the order dated 7 June 1994 be set aside;

(b) In the alternative that the order of appraisement and sale by the Sheriff of the ship by public auction or private treaty to settle the plaintiffs' claim be set aside.

This application was supported by the affidavit of Lim Teik Ee (Lim) the General Manager of Hong Leong. In the affidavit Lim stated Hong Leong had obtained leave to intervene on 17 June, had entered appearance on 22 June, served the same on the solicitors for the plaintiffs and defendants and simultaneously requested for all the cause papers which were only sent to Hong Leong's solicitors on 30 June 1994. This state of affairs is very curious considering the presence of Hong Leong's Counsel in Court on 7 June 1994, and their prior awareness of the first and second actions on or about 15 May. Lim then refers to the judgment of 7 June 1994 for RM468,380 and avers it is:

> ... tidak selamat dan mengandungi isu-isu yang boleh dipertikaikan dan perlu diketepikan oleh kerana pihak plaintif-plaintif khususnya yang pertama, keempatbelas, ketujuhbelas dan keduapuluh tidak menentusahkan tuntutan mereka. Tambahan pula Exh. EEO 1 dan EEO 2 di dalam affidavit plaintif yang pertama adalah tidak berkonsisten dan mengandungi isu-isu yang boleh dipertikaikan.

The second ground averred by Lim was that the order for the appraisement and sale of the ship was contrary to law.

The Master filed an affidavit opposing the Hong Leong's application as an abuse of process for the following reasons:

(a) the Court had already considered the plaintiffs' affidavit in entering judgment under O. 14, and the interveners were attempting to reopen the issues on the quantum of the plaintiffs' claim which the Court had already adjudicated upon;

(b) the interest of the interveners was confined to their position as Mortgagees. They had no interest or equitable knowledge to question the plaintiffs' claim for wages;

(c) the shipowners had failed to pay the plaintiffs' wages after the arrest of the ship on 26 March 1994, and that up to date i.e.; 8 July 1994 the defendants had not provided food or necessaries to the plaintiffs;

(d) notwithstanding the judgment on 7 June 1994 the defendants had still not paid the plaintiffs' wages up to 31 March 1994 or accruing thereafter;

(e) the plaintiffs will be prejudiced if the judgment is set aside.

It was further averred that the interveners would not be prejudiced on the sale of the ship since they could claim priority from the proceeds after the ship was sold.

The matter thus came up for disposal on 12 July 1994. Hong Leong was represented by Mr. Felix Dorairaj. The shipowner's Counsel Mr. Nadkarni was there holding a watching brief as was the cargo owners' solicitor.

Hong Leong's Counsel contended that the interveners had a right to reopen the whole of the plaintiffs' judgment against Finego and have the claim readjudicated.

This is a startling proposition because the judgment was a valid judgment and had been regularly obtained. Nevertheless it was submitted that being a judgment *in rem*, it could be set aside because Hong Leong had an interest in the ship and was therefore entitled to attack the judgment.

It was further contended that the effect of this attack would not affect the personal liability of Finego to satisfy the judgment which would continue to operate against Finego alone as a judgment *in personam*.

Counsel said he was entitled to do this by reason of the judicial reasoning in the *Soeraya Emas*. This decision though not binding upon us, is deserving of the highest respect, bearing in mind the eminence of Karthigesu J as an Admirality Judge.

Before we proceed to analyse that decision we feel obliged to make a response to Hong Leong's observations about the documents submitted by the Master in support of the claim of the plaintiffs.

Counsel stated that the agreement and account of the crew made in pursuance of s. 99 of the Merchant Shipping Ordinance 1952 showed that the Master and plaintiffs numbered 14 and 20 could have no claim because they had signed the Release Column. This suggestion was misconceived. The Master's signature there was for signing off his wife who had come on board on 30 October 1993. Plaintiff 14 signed for the ship's carpenter Daw Hla Hla and plaintiff 20 signed for Mrs. E.A. Yasawathie. Counsel also submitted that the plaintiffs' claims had not been verified. But the affidavit supporting the O. 14 application was in the form required by the Rules. Besides each page of the Crew's Monthly Account Register was also signed by the Master to state that he accepted it as correct.

Another line of argument was that the claim by the Master for $18,500 for an air ticket could not contitute wages and that two items of US$1,600 and US$4,000 referred to as a lending to Capt. Roy Eng could not constitute Wages as defined by the law. Paragraph 321 of the text book *Maritime Liens* (Vol. 14 British Shipping Laws) by D.R. Thomas (1980) at p. 184 shows how liberally the term "Wages" is construed as a matter of Admiralty Policy. There was nothing in this point because Capt. Roy Eng was the shipowner and in the context of this case the two sums could equally be construed as advances made by Capt. Roy Eng to the Master which he had to account for.

Next Hong Leong's Counsel contended that the prayer in the Statement of Claim for the Senior Assistant Registrar to assess the amount due to each plaintiff was ambiguous. As to this it has to be said that the plaintiffs were claiming not just for the total wages and disbursements due till 31 March 1994 but also additional sums due to them until the day they were paid off. We see no ambiguity here.

Next he contended that in the Statement of Claim there was no prayer for the appraisement and sale of the vessel. He cited firstly British Shipping Laws (1975) Vol. 1 - Admiralty Practice para. 382 at p. 167 and Admiralty Jurisdiction and Practice (1993) by Nigel Meeson at p. 144. In the first authority is a passage that, "the *res* must be under arrest **in the action** in which the order of appraisement and sale is asked for and if necessary may be arrested a second time for this purpose." The same statement appears in the second authority at p. 145 where the prescribed procedure for such an application is not a Summons-in-Chambers but a Notice of Motion (to be heard

in Court) supported by affidavit. The plaintiffs' application under O. 14 was made in Chambers. The Master's affidavit in support did not state the grounds why the ship should be sold. The ship was under arrest in the first action but not yet under the second. We shall deal with these objections later.

Counsel for the plaintiffs submitted that Hong Leong had not been in any way prejudiced by the sale, that in the *Soeraya Emas*, the Judge had erred in law by failing to draw the proper distinction between a judgment *in rem* and one *in personam* and more importantly that the Master and Crew had a maritime lien over the ship which entitled them to apply for an order for its sale to pay their accrued wages in any event. He referred to *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming/Intervener)* [1992] 2 MLJ 642 where the Supreme Court held that once a Judge had made an order of sale of charged land he was *functus officio* and it was too late for an intervener to apply to set it aside. He also referred to *Tung Lieng (Penang) Trading v. Liew Cheong Thye* [1986] 2 MLJ 197 to the effect that once a final order was made the Judge was *functus officio.*

On 12 August 1994 the Trial Judge dismissed the interveners application. In his grounds of judgment dated 1 October 1994 he pointed out that Hong Leong had not tendered any new documents and had relied on the same documents he had already considered on 7 June 1994. He held that the decision on that day was not a default decision but a final judgment delivered after hearing both sides. Therefore he said he was *functus officio* and the more so as there was an appeal pending to the Supreme Court by Finego. He referred to *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 and the cases therein cited by Chang Min Tat FJ. This decision stipulates that a judgment regularly obtained cannot be varied or set aside by the Court which made it except under the slip rule unless it is a judgment in default, or made in the absence of a party. If the judgment was obtained by fraud or further material evidence not available at the time is forthcoming to impeach it, then a fresh action to do so may be commenced. None of these factors applied here.

In the event that he was *functus officio* Y.A. Dato' Azmel held the application had no merits because Hong Leong had not produced any new material to contradict the plaintiffs' accounts.

He then dealt with the plaintiffs' maritime lien referring to *Halsbury: Laws of England* Vol. 1 (4th edition) para. 338 p. 233, and s. 145 of the Mercant Shipping Ordinance 1952. On wages he referred to ss. 135 and 136 of the Ordinance. For his power to order sale he referred to *Halsbury's Laws (lbid)* at para. 453 p. 287.

As for his reasons for ordering the appraisement and sale he said this:

> From the above excerpts I am satisfied that the plaintiffs as master and crew of the defendants' ship have maritime lien over the said ship in respect of their claims for wages irrespective whether freights had been earned or not. It is an undisputed fact that the ship had been arrested at the time of the commencement of this action. And in order to realise their claims against the defendants it is only proper under the circumstances to order the sale of the ship which I did. The sale has to be executed as early possible because the ship has been idle for a period of time. Further delay would deteriorate the conditions of the ship and may further reduce the sale price. In addition to that the plaintiffs must be paid their wages as quickly as possible. They had been without money over a very long period of time. The defendants had done nothing to make any payments to them. Hence the earliest possible sale of the ship would enable the 26 plaintiffs to be paid their salaries. As a matter of fact during this hearing I have verbally inquired from the Counsels for the defendants and the interveners whether their clients were prepared to pay the wages of the plaintiffs and if so the sale of the ship could be postponed or set aside. However neither of them was prepared to do so. In the circumstances I have no choice but to order the sale of the ship to be executed an early as possible. In the circumstance the application for a stay of the sale of the ship pending appeal by the defendants was rejected.

The object of permitting intervention is "to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action and to prevent the same or substantially the same questions or issues being tried twice with possibly different results." "... A person may be added as a party who is directly affected either legally or financially by any order which may be made in action." "To entitle a person not a party to an action to intervene and to be joined as a party the r. (O. 15 r. 6) requires that the would be intervener should have some interest which is directly related or connected with the subject matter of the action ..." (These words in quotes are from the Supreme Court Practice 1993 Vol. 1 para. 15/6/7).

Intervention in Admiralty proceedings *in rem* is covered by O. 70 r. 16 of the Rules of High Court 1980 (which is similar to but not in *pari materia* with the English Rule O. 75 r. 17). These differences are not material to our present purposes. Under our rules the intervener applies *ex parte* for leave to appear and having obtained is treated as if he were a defendant named in the writ.

The Rules do not state at which point in time such intervention should take place, but what should be noted is that intervention is not a matter of right but may be had only with the leave of the Court. Judicial discretion is involved. The issue which then arises is whether a person who seeks to intervene after final judgment has been obtained against the defendant should be permitted to do so at all and if so in what circumstances.

We now wish to refer to some passages from the judgment of Lord Denning in *Nana Oforu Atta (etc) v. Nana Abu Bonsra (etc)* [1958] AC 95 p. 101:

The general rule of law undoubtedly is that no person is to be adversely affected by a judgement in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by *res judicata*: the other is that a person may have so acted as to preclude himself from challenging the judgement, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

at p. 102:

Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefits from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v. Andrews* [1871] LR 2 P & M 327, 328. The full passage is in these words:

> "There is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the Judges of the Prerogative court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and if acted upon in courts of equity, where if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done *bona fide* in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened."

at p. 103:

In the present case the Judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court Jackson J said: "The principle is clear and well-established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by later adducing evidence which, had it been in existence, would or should have been adduced at the first trial." In the Court of Appeal Manyo-Plange J said: "... what should the Omanhene of Akim Abuakwa have done in the circumstances? In my view he should have applied to be joined as co-plaintiff. He took no such course. Being cognizant of the proceedings, he was content to stand by and see his battle fought by somebody else in the same interest: the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action, namely, Muronam's title to the land in dispute, without which Akim Abuakwa can not establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of Muronam's title to the land in dispute which had been determined in the action.

On our facts Hong Leong were as good as privys because under the default clause in the mortgages their equity had crystallised and Finego were owners in name only as soon as the ship was arrested. They could have intervened before 7 June 1994 but elected not to do so. Therefore they were estopped from applying to set the judgment aside after it was passed.

Had they done so in time, could they have ventilated the issues which they raised about the wages and disbursements of the Master and Crew? This was a contractual issue as between Finego and the plaintiffs which was of no direct concern to Hong Leong,

In the *Lord Strathcona* (1925) P. p. 143 the plaintiffs were the Mortgagees. Their action *in rem* was against the shipowners who had defaulted in the mortgage payment. Their claim was for judgment (i) for the validity of their mortgages; (ii) against the ship and freight due to them and (iii) for an order of sale. The interveners were the charterers. The judgment was given on 26 January. The interveners appeared on 11 February. They raised two questions: (i) they questioned the validity of the mortgages (ii) they alleged that since the plaintiffs were aware of the existence of the charterparty before the mortgages were created the plaintiffs were bound by them.

In his judgment as to the first question Hill J said at p. 150:

> As for the first contention I asked and received no satisfactory answer to the question: What right have the interveners to raise the contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what *locus standi* they have to dispute the validity of the plaintiffs' mortgages. But I need not further consider this, for the interveners took the benefit of the performance of the charterparty by the Lord Strathcona Steamship Co. (No. 2) as owners for several reasons and cannot now be heard to say that the Strathcona Co. never were owners. As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgement which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reasons of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is whether the interveners are entitled at all, or on the facts of this case, to limit the plaintiffs' right to procure a sale by the Court. **They cannot question the judgment in rem.** Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale? A similar question would be involved if, instead of proceeding *in rem*, the plaintiffs had taken possession and proposed to sell or to use the ship without regard to the charterparty. (Emphasis is added)

As we understand this decision, the issue of the validity of mortgages was not one the charterers could raise afresh because it was *res inter alios acta*. Thus even though it was a default judgment the interveners could not set it aside. Since it was a judgment *in rem* the charterers could not question it

either. The only issue then left was whether the sale of the ship should be proceeded with because that would have interfered with the operations of the charterers.

The next point to be emphasised once more is that *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 at p. 144E, is a decision of the Federal Court. It is binding on us. It categorically states that a final judgment cannot be varied or set aside by the Court which made it, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming a fresh action will lie to impeach the original judgment.

We will now proceed to consider propositions Hong Leong's Counsel sought to extract from the *Soeraya Emas.* At the risk of some distortion the facts there can be summarised thus. In 1985 Aseamlease Bhd. (hereafter referred to as Aseam) sold the ship to Perkapalan Emas (the Shipowners) who made a downpayment of about 20%, and entered into a mortgage in favour of Aseam to repay the balance due in monthly instalments. On 16 August 1988 Singapore Slipway filed a writ *in rem* No. 245 of 1988 (the first action). Their claim was for work done and materials supplied for repairs to the ship. On 23 January 1989 Singapore Slipway arrested the ship in the first action. Several other claimants came forward to assert their claims against the ship in the usual way i.e. by first lodging a caveat against release, and then applying for leave to intervene and filling an appearance.

Three of these claimants were:

(i) Aseam as mortgagees who entered appearance on 9 February 1989.

(ii) Inter Maritime whose claim was for various expenses disbursed on behalf of the shipowners including crew, waters, bunkers and repairs. They entered appearance on 27 February 1989.

(iii) Hang Sing whose claim was for goods and services rendered to the ship prior to its arrest by Singapore Slipway. Hang Sing entered appearance on 3 March 1989.

(iv) The shipowners who entered appearance on 10 February 1989.

The shipowners then stood by and did not prevent Singapore Slipway from:

(i) getting leave to enter summary judgment on 20 March 1989 for $268,130 plus interest and costs, and

(ii) entering judgment on 8 April 1989.

On 4 March 1989 Singapore Slipway obtained a Court order **by consent** of the shipowners to make payment to the crew of the ship and repatriate them, these expenses to form part of the Sheriff's expenses, that the ship be

appraised and sold, and that the proceeds of sale be deposited in Court. (The other terms of this order need not delay us here). All the interveners who appeared also consented to the order **except Inter Maritime** whose consent was not endorsed on the draft order.

The ship was sold for $1.04 million on 8 April 1989. On 26 May 1989 Singapore Slipway obtained a Court order for the payment out of the Sheriff's expenses as being of first priority ranking and for the relative priorities of all other claims to be reserved.

On 14 February 1989 Aseam had filed Admiralty *in Rem* No. 51 of 1989 against the shipowners (the second action) and served the ship on 20 February 1989. The ship was then under arrest in the first action and continued to be in the custody of the Sheriff till her sale on 8 April 1989.

In this second action:

(i) Singapore Slipway obtained leave to intervene and appeared on 11 March 1989.

(ii) The shipowners appeared on 21 March 1989.

On 25 April 1989 Aseam applied for summary judgment under O. 14 in the terms of their amended statement of claim. When their application was heard on 21 July 1989 the shipowners **consented** to Aseam's money claim without raising any defence by way of affidavit. The order of Court dated 26 July 1989 provided that the mortgage by the shipowners and Aseam dated 11 December 1985 be declared valid and **by consent** gave liberty to enter final judgment for the money claimed in their last amended statement of claim. However at the time of Inter Maritime's subsequent attack on this order final judgment had **not** been entered and in the circumstances which followed it never was.

Karthigesu J said there was duplicity on the part of the shipowners in not contesting Aseam's claim. (See judgment at p. 39c) because their act in entering appearance and then not contesting the mortgage was inexplicable. He pointed out that Aseam had obtained an *in rem* judgment and being a secured creditor ranked high in the order of priority of claims.

Having got this judgment Aseam applied on 10 August 1989 in the first action by motion for a determination that their claim ranked above all other claims for payment out. Inter Maritime, having already intervened in the first action as aforesaid, now responded by applying for and obtaining leave to intervene in the second action and entered appearance on 31 August 1989.

On 6 September 1989 they applied:

(i) firstly that the whole of the consent order made on 21 July 1989 and any judgment entered pursuant thereto to be set aside;

(ii) additionally or alternatively for a declaration that the consent order of 21 July 1989 shall not be binding on Inter Maritime.

On 3 April 1990 the learned Assistant Registrar upheld a preliminary objection by Aseam's Counsel and held that the Court could not set aside a consent judgment and further held that Inter Maritime had no *locus standi*. He dismissed the second prayer on 11 April 1991.

The matter then came up on appeal before Karthigesu J. At pp. 40 to 42 of his judgment he followed *The Gemma* [1899] p. 285, *The 8 August* [1983] 2 AC 450 and *The Dictator* [1892] p. 304 and held that once the shipowners entered appearance to Aseam's writ the action continued not only *in rem* against the ship but also *in personam*.

Then comes this passage in the judgment upon which Hong Leong's Counsel places such heavy emphasis for the proposition he advanced. It is reproduced here in full:

> In my view the learned assistant registrar failed to appreciate this important principle and refinement given to it by Lord Brandon in '*The 8 August*' [1983] 2 AC 450. Had he appreciated it he would not have fallen into the error of applying the principles applicable solely to setting aside of consent judgments in non-admiralty civil actions confusing the standing of Inter Maritime as intervener in these proceedings. In so far as Inter Maritime were concerned, these proceedings were and still are an admiralty action in rem but in so far as the defendants are concerned, by reason of their appearance and albeit by their consent a judgement has been entered against them for which they, Perkapalan Emas, are also personally liable.
>
> This being so, the order of Court dated 21 July 1989 giving the plaintiffs leave to enter final judgement against the defendants, binds only the plaintiff and the defendants, Perkapalan Emas. The order, being made with the consent of the defendant, cannot be set aside by the defendants. In such a situation the cases relied on by the plaintiffs such as *Ainsworth v. Wilding* [1896] 1 Ch 673 and *Emeris v. Woodward* [1898] Ch 185 would apply. The Court would not have the jurisdiction to set aside the consent judgment. The same may be true of Singapore Slipway, an intervener, who entered an appearance in these proceedings, had they applied to set aside order of Court dated 21 July 1989 since they appeared at the O. 14 hearing, raised no defences and consented. But Inter Maritime had not then entered upon these proceedings and could not therefore have consented. I am not persuaded by plaintiffs' counsel's argument that had Inter Maritime been vigilant to protect their interest against the *Soeraya Emas* they would have intervened in these proceedings before 21 July 1989 and by not doing so had deliberately allowed the order to have been made. Accordingly it was too late for them now to apply as an interested party to set aside the order of Court of 21 July 1989.

We have not found this part of the judgment easy to understand, especially how it comes to be suggested that a shipowner **can continue** to be held liable under a judgment in an action *in rem* to which he has entered appearance, when that very judgment has been set aside by a successful intervener. The only precedents we have been able to find of a final judgment *in personam* and *in rem* is Form 313 and 314 in British Shipping Laws (1964). We can find nothing here to suggest that a final judgment *in rem* is a divisible commodity so that if it is set aside at the instance of an intervener it can still continue to have an independent existence against the shipowner.

There are of course authorities to say that the shipowner who has entered appearance will incur a liability *in personam* which overlaps the judgment *in rem* so that if the proceeds of sale of the ship are insufficient to satisfy the plaintiffs' claim, the plaintiffs can still proceed against the owner personally. (*The Gemma* [1899] P. 285 at p. 292 and *The Dictator* [1892] P. 304 at p. 320). But in those cases there was only **one** judgment in the contemplation of the Court, and it was an *in rem* judgment. The fact that it encapsulated a liability *in personam* did not change the fact that there was **one** judgment.

The reasons of the learned Judge in *The Soeraya Emas* for setting aside the whole of the order made on 21 July 1989 (see judgment at p. 40G) may be tabulated thus:

(i) Inter Maritime had a sufficient interest to intervene in the action.

(ii) They were permitted to set up such defences as the owner could have set up if the shipowners had defended the action.

(iii) They had raised a *prima facie* case which cast a doubt on the validity of the mortgages.

(iv) They had *locus standi* because if the mortgages were invalid they had a greater certainty of having their claim paid out.

(v) The shipowners could be accused of duplicity in not taking the defences going to the validity of the mortgages and therefore the merits of Aseam's case.

(vi) It was essential that the merits of the plaintiffs' case be gone into in an application for summary judgment in an *in rem* action and a consent judgment is equated to a default judgment for this purpose.

(vii) Additionally natural justice demands that if there is any defence to the plaintiffs' claim the interveners ought to be allowed to raise it provided the plaintiffs are not prejudiced thereby.

(viii) Lastly O. 14 proceedings if not watched carefully in admiralty in rem actions could lead to abuse.

The remarks of Karthigesu J which follow about unscrupulous shipowners colluding with Master and Crew to inflate wages were of course *obiter dicta.* In our case there is no suggestion whatsoever of any collusion whatsoever between the parties. The judgment obtained by the Master and Crew was in no sense an interlocutory judgment. It was a final judgment. Nor was it a default judgment, and the defences which were taken by Hong Leong were the same defences which Counsel for the **BRIHOPE** advanced, albeit without the help of Eng's affidavit. Nor do we have any amendments to our Rules in parity with the Singapore RSC O. 14 r. 2(8). Our plaintiffs complied with the RHC O. 14 r. 2. As for natural justice, our situation is that a fair opportunity of being heard was afforded to Hong Leong who deliberately chose not to avail themselves of it when they appeared before the Judge on 7 June 1994. To allow Hong Leong to reopen the same issues would have prejudiced the plaintiffs not least because of the tremendous delay it would have caused.

An added problem in our case is that if appearance had been correctly entered it would have read "Enter an appearance for Finego". The judgment would then have been against them personally. The proper form the judgment should have taken has not been canvassed before us. The error referred to was as a consequence carried forward into the summary judgment given here which was "terhadap defenden-defenden" (i.e. the owner and other persons having an interest in the ship M.V. BRIHOPE). Hong Leong were there and did not object to the order being made in this form. These differences are sufficient to negate any comfort Hong Leong can hope to derive from the *Soeraya Emas*.

We would now go further to say that we cannot accept the *Soeraya Emas* is good authority for the proposition that interveners in an Admiralty *in rem* action can come in at any time after a final judgment has been pronounced and have the whole matter reopened to take defences the shipowners ought to have taken.

There is no question of any **right** of intervention here. Order 70 r. 16 is clear. "A person who has an interest in that property ... **may**, with the leave of the Court, intervene in the action."

Had Hong Leong come in before the judgment was pronounced on 7 June 1994 we are not prepared to say that *The Strathcona* in any way opens the door for Hong Leong to question the quantum of the wages. That defence was only open to Finego. The charterer in the Lord Strathcona was not permitted to attack the validity of the mortgages because they had no *locus standi*, and they were not permitted to attack the judgment just because it was an *in rem* judgment.

The last sentence from the passage we have quoted from p. 42 at G shows that Karthigesu J was not persuaded by arguments that Inter Maritime should have been vigilant but how can this be extended to cover proposed interveners

who want to come in after final judgment has been given? Page 43 of his judgment at E reads:

> A person who has been given leave to intervene in an admiralty action *in rem* does not prosecute his claim in that action. He protects his interest in the property by defending the action *in rem*. In doing so he will be permitted to set up such defences which the owners of the ship could have set up had they defended the action. See *'The Byzantion'* [1922] 16 Asp MLC 19; 127 LT 756.

In the report of *The Byzantion* at [1922] 127 LT 756 the first two paragraphs read as follows:

> The Admiralty Court has jurisdiction under s. 3 of the Admiralty Court Act 1840 to take cognisance of mortgage claims relating to a ship if the ship or proceeds are under arrest of the Court at the time when the proceedings are instituted, notwithstanding that the mortgage is not a legal mortgage.
>
> A party who intervenes in, and defends an action *in rem* cannot set up defences which the owners of the ship could not have set up had they appeared and defended.

and in the judgment at p. 759 is this passages:

> ... The result is that, whatever the Greek law, and whether the mortgagees have in fact a mortgage upon a ship or not, they, by agreement, are to have the same rights as against Mr. Mango as if they had a registered mortage on an English ship. Mr. Mango, by contract, agrees to submit to the jurisdiction *in rem* or *in personam* given to the Court by s. 11 of the Act of 1861 as if the ship and mortgage were registered in England. The effect is two-fold: (1) as to jurisdiction, there was jurisdiction by contract; (2) as to rights, as between the Graham Company and Mr. Mango, the Graham Company are to be treated as if they were registered mortgagees of a British ship, and as if entitled to sue *in rem*. The interveners contend that they cannot be prejudiced by this agreement between the mortgagees and mortgagor, and that as against the agreement must be disregarded. In my view this contention confuses the rights of the intervener. Intervention may be for either or both of two purposes: (1) to defend the action either as to liability or as to quantum or both, and (2) to establish a prior claim to the *res* without defending the action. But where the intervener defends, he defends an action not against himself but against the *res* and, as there can be no liability of the *res* unless there is a personal liability of the owner, he defends an action against the owner. The questions on such a defence are, is the owner liable to the plaintiff, and has the plaintiff a right *in rem* against the ship? It follows that the intervener cannot set up defences unless they are defences which the owner could set up. If the suit is one which the plaintiff could, if the owner appeared, maintain *in rem* against the ship, because the owner was liable in a suit *in rem*, the plaintiff can maintain it *in rem* against the intervener. The position of the intervener is, *qua* defence, the same as that of an owner who appears under protest, and the issue to be tried is the same as on a petition in protest. If by agreement the Graham Company have a good cause of action *in rem* and if by the agreement the Court is given jurisdiction as between the Graham

Company and Mr. Mango, the interveners as defending the action cannot stand in any better position than Mr. Mango.

In *The Byzantion* the intervener had already obtained judgment in a previous action in default of appearance by the owner Mr. Mango. This was an *in rem* judgment against the ship for dry dock goods and services rendered. In the present action Mr. Mango had again not appeared but the interveners (being the holders of the judgment in the previous action) now came in to **defend** this action in place of the owner. It was not a case of an application to set aside an *in rem* judgment but a proceeding to prevent such a judgment being passed.

This distinction may explain the true position. If the intervener comes in good time he can defend the action in place of the owner, if the owner himself fails to appear. If he is attempting to set aside a final judgment to which he was not a party he cannot take defences which the owner had not taken because he is no longer **defending** the claim in place of the shipowner. All he can now do is to assert his interest but the judgment *in rem* must stand as it did in the *Lord Srathcona*. It is not irrelevant to point out that both Mortgage Deeds in favour of Hong Leong contained a Power of Authority enabling to defend the action in the name of Finego.

We have derived some oblique support for our view that an intervener cannot come in after the shipowners' liability had been pronounced, from the *The "Alletta"* [1974] LL.L R p. 40 at p. 50 where Mocatta J said:

> If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third party who had bought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully have contested the issue of liability. Despite Mr. Sheen's efforts to answer these supposed circumstances by saying that the Court would find some method of reopening the issue of liability so as to enable the third party to contest it properly and anew, I cannot see how such an end could be achieved. I refer again to what was said in *The Point Breeze* at p. 142. The position would be quite different from that obtaining when an arrest is effected after transfer of the *res* to such a third party, **but before there had been judgment on liability. The third party can then intervene;** see O. 75 r. 17. Similar circumstances, *mutatis mutandis*, can readily and perhaps more realistically be envisaged in relation to the rights of a mortgagee, who can intervene to protect his interest, if this be possible on the facts, against the claim of a holder of an alleged maritime lien provided the vessel mortgaged be arrested **before judgment on liability;** *aliter*, if the arrest subsequent to such judgment.

So we come back to this position that whoever attempts in Malaysia to set aside a final judgment regularly obtained be it *in rem* or *in personam*, can only do so if he brings himself within the parameters set out in *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143.

We can find nothing inimical to this proposition in *The Glomar* [1953] 2 Lloyds Rep. 208, *The Fairport* (No. 4) (1967) 1 Lloyds Rep. 602 or the passages in *Halbury's Laws of England* (4th Edn.) Vol. 1 para. 454 cited by the Hong Leong's Counsel.

Consequently we must hold that the trial Judge was *functus officio* because this was not a default judgment. If fraud was being alleged (and it was not), the remedy was to bring a fresh action. We must remember that Hong Leong was not content to assert that its mortgages were valid and it had a right to share in the proceeds of the sale. The prayers were that the whole of the judgment of 7 June 1994 be set aside or alternatively that the order of appraisement and sale be set aside. It may be that collusion between unscrupulous shipowners and crew to inflate wages to cheat genuine creditors is fraud but such speculation is not relevant to this judgment.

We now come to the last issue in the second appeal and that is whether by reason of certain irregularities the order made on 7 June 1994 was made without jurisdiction or was null and void especially that part of it relating to the appraisement and sale of the vessel

The procedure for obtaining default judgments in actions on *rem* is specifically provided for by O. 79 r. 20. Where an appearance has been entered by the defendant (as was done by the solicitors for the shipowners in this case) an application for a judgment in default of defence can be made **after** the time for filing the defence has expired. The Court has the power to set aside or vary such judgments by default by O. 70 r. 20(9). In our case the Master and Crew moved for summary judgment under O. 14 shortly after appearance was entered. They were quite entitled to do this (see *The August 8* [1983] 2 AC 450 at 452/453 – the passage is quoted in the *Soeraya Emas* at p. 39).

These alleged irregularities were that the statement of claim did not contain any prayer for appraisement and sale, that the ship was under arrest in the first action and not in the second, that the O. 14 application being an application in chambers was not a proper vehicle for an application for appraisement and sale, that it had not been made by motion and served on all the parties, and that by signing judgment the Master and crew had lost their right to arrest the vessel. Various authorities were cited to assist the Court to arrive at a finding that the judgment was a nullity in this respect.

But we must bear in mind that there were only four parties involved in this exercise – the shipowners, the crew, the cargo owners and the mortgagees, and at all material stages of the proceedings both in the first and the second action all of them knew what the other was doing.

Thus when the ship was arrested in the first action, the shipowners immediately became involved with the Master and Crew who filed a caveat in the first action against release and payment out. In the second action on 7 June 1994 Counsel for all four parties were present in Court, with Hong Leong and cargo owners' Counsel holding watching briefs.

The Statement of Claim in the second action referred to the arrest in the first action. The caveat by the crew in the first action was known to the shipowner. In the circumstances the omission to request for an appraisement and sale in the Statement Claim was not a material omission. The object of requiring an application for such an order be by way of motion with a supporting affidavit is to ensure that due notice is given to all concerned. In the present case all concerned were in Court when the O. 14 application was heard and they knew that an application was being made for appraisement and sale so that the claims of the Master and Crew could be paid out.

Next we must examine the purpose of the Admiralty practice that the application for appraisement and sale be made in the action in which the arrest was affected, failing which, the text books suggest that second arrest should be made.

It seems to us that we need to make a distinction here between the traditional Admiralty jurisdiction by the general law of the sea and the statutory jurisdiction conferred by the Supreme Court Act 1981 which incorporated and updated the statutory jurisdiction conferred by previous statutes.

In *The Tolten* [1946] p. 135 the owners of a wharf in Lagos which was damaged when ***The Tolten*** collided with it brought an action *in rem* in the High Court in London. The defendants submitted that the Court could not have any jurisdiction because the Admiralty Court Act 1861 did not vest the Court with jurisdiction to adjudicate in an action *in rem* for damage done by a vessel to property attached to foreign soil. At p. 144 Scott LJ said that "The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effect," After setting out some dicta by Sir John Jervis in *The Bold Buccleugh,* and by Lord Macnaghten in *The Sara* he continued:

> In *The Ripon City* (5) Gorell Barnes J reviewed the history of the maritime lien in our law in a long judgment from which, so far as I know, there has been no subsequent dissent. The following extracts describe the essential characteristics. He said in *Ainsworth v. Wilding* [1896] 1 Ch 673: "The definition of a maritime lien as recognized by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process." Later on he continued: "The result of my examination of these principles and authorities is a follows: The law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage." According to the definition above given, such lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process.

He then says laters at p. 145/146:

> The lien consists in the substantive right of putting into operation the admiralty court's executive function of arresting and selling the ship, so as to give clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities, and subject thereto ratebly. I call that function of the Court "executive" because, once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the Court to perform, save that in the registry where priorities, quantum and distribution are dealt with.

We would emphasise the reference to "the substantive right" and the Admiralty Court's executive function. The Courts have always a liberal view of what constitutes "wages". We hold that if a seaman's contract includes emoluments by way of air passages on home leave for himself or his spouse it comes within the definition of wages. Money for necessaries advanced on the credit of the ship could also give a paramount right of repayments enforceable in *rem* against the ship (see *Foong Tai v. Bucheister* [1908] AC 458).

The learned trial Judge has stated in his judgment why he ordered the ampraisement and sale. The ship had been idle for a period of time, delay was prejudicial to the condition of the ship and its resale value, and the Crew had gone without their wages for a very long of period of time. Mr. Bernard Kok of Counsel has referred to O. 29 r. 4 of the Rules of the High Court 1990 and DC Jackson in Enforcement of Maritime Claims (1985) at p. 374 where he says under footnote 33 that:

> A sale to be under (O. 75 r. 23) is confined to property that must be under arrest but it would seem that sale under O. 29 r. 4 is available in all admiralty actions and indeed, the power to order sale pending suit stems from O. 29 r. 4.

The Westport [1965] 1 LL.LR, 547 is an instance of a sale ordered where the ship was deteriorating.

In *The Wexford* [1887] 13P at p. 10 the Court held that it will not make an order for sale of a vessel which is not in the hands of the Court. Here the BRIHOPE was in the hands of the Penang High Court. The arresting Sheriff was the same person who had possession custody and complete control: See the *Arantzaze Mendi* [1939] AC 256.

Nor do we think that *The "Cap Bon"* [1967] 1 LL LR 543, assists the interveners because the judgment which the plaintiffs there wished to enforce was obtained in a proceeding in another venue. It can be implied from the Supreme Court Practice 1993 Vol. 1 para. 75/22/2 that where the *res* is in the hands of the very same Court the requirement that the *res* must be under arrest in the action in which the order for appraisement and sale is sought is only a **practice** and not a mandatory requirement going to jurisdiction.

The Alletta [1974] 1 LLLR 72 is distinguishable. The plaintiffs there obtained judgment on 21 October 1965 against the first defendants who were the owners of the vessel. On 20 June 1973 *The Alletta* was sold to the second defendants who knew nothing of the plaintiffs judgment. On 9 July 1973 the plaintiffs obtained *ex parte* a warrant of arrest. The Court set it aside *inter alia* because the plaintiffs' right to arrest the *Alletta* had merged into the judgment in 1965 and could not be reviewed eight years later.

In our case the BRIHOPE was already under arrest when the second action was filed and the Crew had a hold on the ship by their caveat. It was still under arrest when judgment was obtained. Our O. 70 rr. 21 and 22 (c/f English O. 75 rr. 22 and 23) requires certain steps to be taken after a ship has been ordered to be sold in an action *in rem*. These steps were complied with. On 8 September 1994 in the second action the ship was arrested by the Master and Crew. On 3 October 1994 the cargo owners released the vessel from the arrest in the first action, and caveated the release and payment out of the proceeds of sale.

It may be that in failing to arrest the ship in the second action before they applied for judgment under O. 14 and simultaneously asked for an appraisement and order of sale the plaintiffs' solicitors fell short of perfection. It also may be that in the earlier stages of this litigation the pleadings filed by all concerned left a lot to be desired. But as Sir Jack Jacob (who prepared the first draft of O. 2 of the RHC 1980) said:

> For myself, I believe that the function of the rules of Court is "to provide guide-lines not trip wires, "... they should be construed to secure the just speedy and inexpensive determination of every action." (In "Justice Between Man and Man - Current Legal Problems 1985 p. 225)

Before the appraisal and sale finally took place the plaintiffs' solicitors regularised the position by arresting the vessel in this action, and Hong Leong participated in the exercise. Order 2 r. 1 requires the Court to treat every non-compliance as irregularity which the Court can remedy as it think just. This is indeed what happened and it is not open to Hong Leong to contend that the order made on 7 June 1994 is a nullity.

For these reasons we dismissed this second appeal also with the usual order as to costs.

Reported by W.A. Sharif